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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1037

RICHARD S. WILLIS, APPELLANT,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent

GREENBERG, *Judge*: The appellant, Richard S. Willis, appeals through counsel that part of a February 12, 2016, Board of Veterans' Appeals (Board) decision that denied a disability rating in excess of 20% for chondromalacia patella of the left knee and denied a disability rating in excess of 20% for chondromalacia patella of the right knee.[1] Record (R.) at 2-37. The appellant argues that the Board erred when it provided an inadequate statement of reasons or bases for denying entitlement to a separate rating for arthritis and declining to refer the matter for extraschedular consideration. Appellant's Brief at 7-16. For the following reasons, the Court will vacate that part of Board's February 2016 decision on appeal and remand the matters for and readjudication.

[1] The Board remanded the issues of (1) service connection for sleep apnea; (2) entitlement to a disability rating in excess of 10% for gastroesophageal reflux disease; (3) entitlement to a disability rating in excess of 30% for an acquired psychiatric disability, to include an adjustment depressive disorder with anxious features; and (4) entitlement to a total disability rating based upon individual unemployability. These matters are not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997). The Board also found that new and material evidence had been submitted to reopen a hepatitis C claim. The Court will not disturb this favorable finding. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). Additionally, the Board dismissed a claim of entitlement to service connection for post-traumatic stress disorder, as separate from a service-connected acquired psychiatric disability for a lack of jurisdiction. The Board also denied service connection for hepatitis C and entitlement to a disability rating in excess of 20% for lumbar spine disc disease. The appellant presents no argument to these matters and the Court deems them abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (holding that, where an appellant abandons an issue or claim, the Court will not address it).

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); *see* 38 U.S.C. § 7261. The creation of a special court solely for veterans, and other specified relations such as their widows, is consistent with congressional intent as old as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the statutory command of Congress that a single judge may issue a binding decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993); *see generally Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

From the beginning of the Republic statutory construction concerning congressional promises to veterans has been of great concern. "By the act concerning invalids, passed in June, 1794, vol. 3. p. 112, the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?" *Marbury v. Madison*, 5 U.S. 137, 164, 2 L. Ed. 60, 69 (1803).

The appellant served on active duty in the U.S. Army from July 1972 to March 1974 as a mechanic. R. at 144 (DD Form 214). The appellant has stated that during basic training, he fell and injured both knees. R. at 556.

In April 1974, the appellant filed for benefits based on service connection for a bilateral knee disability. R. at 2740. In July 1974, VA granted service connection for bilateral chondromalacia with a non-compensable rating. R. at 556.

In December 2006, the appellant filed for an increased rating for his bilateral knee disability and the regional office granted an increased 20% disability rating for "recurrent subluxation or lateral instability of the [knees] which is moderate." R. at 1642, 1504-05. The appellant appealed. R. at 1416-22.

An October 2015 VA medical examiner diagnosed the appellant with bilateral osteoarthritis and observed that the appellant "ambulated with a slow and steady gait due to *all* cause pain (sic), however the gait observed was with some limping due to unrelated foot pain which vet reports is his worst pain condition." R. at 260.

In February 2016, the Board denied increased disability ratings in excess of 20% for the appellant's bilateral knee disabilities. R. at 2-22. The Board acknowledged that the appellant was currently in receipt of 20% disability ratings for his knees for moderate recurrent subluxation or lateral instability. R. at 15. The Board found that the appellant's "bilateral knee disabilities are manifested by objective evidence of arthritis on radiologic examination and by pain on use." R. at 14. A separate rating under Diagnostic Code (DC) 5003 was denied because the Board found that the appellant did not have a compensable limitation of motion. R. at 12-14. This appeal ensued.

The Court agrees with the appellant that the Board provided an inadequate statement of reasons or bases for finding that the appellant did not have a limitation of motion. *See* 38 U.S.C. § 7104(d)(1) ("Each decision of the Board shall include . . . a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented in the record."); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (finding that Congress mandated, by statute, that the Board provide a written statement of reasons or bases for its conclusions that is adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate review in this Court). The appellant is correct that under DC 5003, "*painful* motion . . . caused by degenerative arthritis, is "deemed to be limited motion and entitled to a minimum 10[%] rating . . . even though there is no *actual* limitation of motion." *Lichtenfels v. Derwinski*, 1 Vet.App. 484, 488 (1991). Objectively confirmed evidence of painful motion can include "a doctor's observation of a veteran's painful motion" as well as "a lay description detailing observations of a veteran's difficulty walking." *Petitti v. McDonald*, 27 Vet.App. 415, 427-28 (2015).

The June 2015 VA examiner found that the appellant "ambulated with a slow and steady gait due to *all* cause pain, however the gait observed was with some limping due to unrelated foot pain which vet reports is his worst pain condition." R. at 260 (emphasis added). Although the examiner attributed the appellant's limping to foot condition, it appears that she recorded an observation of painful motion sufficient to warrant a separate rating under DC 5003, especially

given that the Board found that the appellant's bilateral knee disability was "manifested by objective evidence of arthritis on radiologic examination and by pain on use." R. at 14; *see also Lichtenfels* and *Petitti*, both *supra.* Remand is required for the Board to provide an adequate statement of reasons or bases for its determination as to whether the appellant is entitled to a separate rating for bilateral knee arthritis. *Gilbert*, *supra.*

Because the Court is remanding the matters on a schedular basis, it is premature to address any arguments pertaining to extraschedular consideration. On remand, the appellant may present, and the Board must consider, any additional evidence and arguments. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2. U.S. (2 Dall.) at 409, 410, n. ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one.").

Based on the foregoing reasons, that part of the February 12, 2016, Board decision on appeal is VACATED and the matter is REMANDED for readjudication.

DATED: June 29, 2017

Copies to:

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